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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 780

THE CHRONICLE & GAZETTE PUBLISHING CO., INC.,

Appellant,

vs.

ATTORNEY GENERAL, ET AL.,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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INDEX

Subject Index

	Page
Statement opposing jurisdiction	1
Statement of the case	2
Argument	3
Motion to dismiss or affirm	11

Table of Cases Cited

Adams v. *Lansdon*, 18 Idaho 483, 110 Pac. 280 (1910)	9
Alabama State Federation, etc. v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725, 65 Sup. Ct. 1384 (1945)	8
Assoc. Press v. *N. L. R. B.*, 301 U. S. 103, 81 L. Ed. 953, 57 Sup. Ct. 650 (1937)	9
Assoc. Press et al. v. *U. S.*, 326 U. S. 1, 89 L. Ed. 2013, 65 Sup. Ct. 1416 (1945)	9
Chronicle & Gazette Pub. Co., Inc. v. *Attorney General*, 94 N. H. —, 48 Atl. 2d 478 (decided June 27, 1946; rehearing denied without opinion September 3, 1946)	2
Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co. v. *Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 Sup. Ct. 208 (1906)	6
Commonwealth v. *Evans*, 156 Pa. Super. 321, 40 Atl. 2d 137, 138-139 (1945)	9
Giragi v. *Moore*, 301 U. S. 670, 81 L. Ed. 1334, 57 Sup. St. 945 (1936)	9
Grosjean v. *American Press Co., Inc.*, 297 U. S. 233, 80 L. Ed. 660, 56 Sup. Ct. 444 (1936)	9
Herndon v. *Georgia*, 295 U. S. 441, 442-443, 79 L. Ed. 1530, 55 Sup. Ct. 794 (1935)	5
LaFollette v. *Kohler*, 200 Wis. 518, 228 N. W. 895 (1930)	9
Maxwell v. *Newbold*, 18 How. 511, 516, 15 L. Ed. 506, 508 (1855)	5
Messenger v. *Mason*, 10 Wall. 507, 509, 19 L. Ed. 1028. 1029 (1870)	5

Page

Osborne v. *Clark*, 204 U. S. 565, 51 L. Ed. 619, 27 Sup. Ct. 319 (1907) 6

State v. *Chaplinsky*, 91 N. H. 310, 317, 18 Atl. 2d 754, affd. 315 U. S. 568, 86 L. Ed. 1031, 62 Sup. Ct. 766 .. 9

Williams v. *Kaiser*, 323 U. S. 471, 477, 89 L. Ed. 398, 65 S. Ct. 363 (1945) 4

STATUTES CITED

New Hampshire Public Acts and Joint Resolutions of the Legislature of 1945 and Special Session of 1944, Chapter 185 2

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APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

APPELLEE'S STATEMENT OPPOSING JURISDICTION

Pursuant to Rule 12, paragraph 3, Rules of the Supreme Court of the United States, comes now the Attorney General of the State of New Hampshire, appellee, in the above entitled case and discloses the following matter making against the jurisdiction of the Supreme Court of the United States, as asserted in a statement of the basis of appellate jurisdiction filed by the appellant on November 4, 1946.

Statement of the Case

Appellant filed a petition for a declaratory judgment requesting the Superior Court, Rockingham County, New Hampshire, April Term, 1946 to adjudge and decree its "rights under and the constitutionality of chapter 185 of the Session Laws of 1945." The questions of law raised by the petition were reserveed and transferred without ruling to the Supreme Court of the state. Case discharged without reference to the Federal Constitution in the majority opinion. *The Chronicle & Gazette Publishing Co., Inc.* v. *Attorney General*, 94 N. H. —, 48 Atl. 2d 378 (Decided, June 27, 1946; Rehearing denied without opinion, September 3, 1946).

Chapter 185 of the Session Laws of 1945, entitled "An Act Relating to Political Advertising," amended chapter 42 of the Revised Laws, and reads:

> "1. Political Advertising. Amend section 6, chapter 42, of the Revised Laws, by striking out said section and inserting in place thereof the following: 6. Political Advertising. No person shall publish, or cause to be published in a newspaper or other periodical any paid matter which is designed or tends to aid, injure or defeat any candidate for public office, or a constitutional amendment, or any other question submitted to the voters, unless the name of the chairman or secretary, or the names of two officers of the political or other organization inserting the same, or the name of some voter who is responsible therefor, with his residence and the street and number thereof, if any, appear in the nature of a signature. Such matter inserted in reading columns shall be marked at the beginning thereof in a distinctive type "Political Advertisement." No person or corporation, within this state, operating a radio station or network of stations shall broadcast any such paid political matter without first announcing the person or committee paying therefor. Any person who violates,

or in any way knowingly aids or abets the violation of, any provision of this section shall be fined not more than one hundred dollars, or imprisoned not more than sixty days.

"2. Maximum Charges for Political Advertising. Amend section 9, chapter 42 of the Revised Laws by striking out said section and inserting in place thereof the following: 9. Payments for Publication. No person or corporation, within the state, publishing a newspaper or other periodical or operating a radio station or network of stations shall receive for political advertising or for political broadcasts, a rate in excess of the rate or rates regularly charged by such person or corporation for commercial advertising or for commercial broadcasts of similar character and classification and no candidate or political committee shall pay for political advertising or broadcasts any rate or charge in excess of such rate or rates regularly charged.

"3. Filing of Rates. Amend chapter 42 of the Revised Laws by inserting after section 9 the following new section: 9-a. Rates to be Filed. Every person or corporation, within this state, publishing a newspaper or other periodical, or operating a radio station or network of stations, shall file with the secretary of state for public inspection a schedule or schedules showing the rates for commercial advertising and commercial broadcasts. Any such schedule may be changed or amended by filing a new or amended schedule with the secretary of state, but such new or amended rates shall not be effective until thirty days after filing.

"4. Takes Effect. This act shall take effect upon its passage. [Approved May 18, 1945]"

The original defendant were the chairmen and secretaries of the Republican and Democratic Committees of the City of Portsmouth, who were responsible for the insertion of certain political advertisements in the appellant's newspaper. Payments were made at rates in excess of the regular com-

mercial rates. Subsequent to the commencement of the action and immediately prior to the transfer of the case to the Supreme Court of New Hampshire, the Attorney General was joined as a party defendant.

I. No Substantial Federal Question Is Presented

A. *It must appear from the record that a federal question was raised.*

> "It is a well established principle of the Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. • • • And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the court will not undertake to review it." *Williams* v. *Kaiser*, 323 U. S. 471, 477, 89 L. Ed. 398, 65 S. Ct. 363 (1945) and cases cited.

B. *No federal question is raised by appellant's original petition.*

We find no reference in the record to any specific part of the Constitution of the United States until after the majority opinion of the state's highest court sustaining the validty of the state statute had been written. Then the question was raised by the presiding justice in his dissent (R. M). It is true that the appellant in its original petition in the Superior Court of Rockingham County made a passing reference to the Federal Constitution when it requested a ruling that:

> "(3) It is an abridgment of the right of freedom of the press guaranteed in Article 22 of the Constitution of the State of New Hampshire and violates the Constitution of the United States;

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"(4) It is regulatory and discriminatory and thus violative of the equal protection of the laws guaranteed in Article 10 of the Constitution of the State of New Hampshire and Constitution of the United States;" (R. —).

Such a casual citation does not, of course, show that the federal question was raised before the Supreme Court of the State or that the judicial mind of the Court was exercised upon it. A preliminary attack on the ground that it was "in conflict with the Constitution and laws of the United States," or "unconstitutional and void," or, in violation "of the Constitution of the United States," lacks sufficient specification to raise a federal question.

Maxwell v. *Newbold*, 18 How. 511, 516, 15 L. Ed. 506, 508 (1855);

Messenger v. *Mason*, 10 Wall. 507, 509, 19 L. Ed. 1028, 1029 (1870);

Herndon v. *Georgia*, 295 U. S. 441, 442-443, 79 L. Ed. 1530, 55 S. Ct. 794 (1935).

C. *No federal question is raised by the briefs of either party prior to the opinion of the highest Court of the State.*

A careful study of the appellant's brief before the New Hampshire Supreme Court upon transfer of the case does not reveal the slightest indication that it contested the validity of the statute under any part of the Constitution of the United States. On the contrary, three of the four sections of his argument on constitutionality refer specifically to sections of the *state* constitution which he quotes *verbatim*. The same is true in the appellee's brief.

Of course, precedents decided by the United States Supreme Court were cited by both parties, and by the state court as well in its opinion—a fact which the appellant has labored in his Statement of the Basis of Jurisdiction—but

the citation of federal cases is insignificant. Mr. Justice Holmes recognized this principle in *Osborne* v. *Clark*, 204 U. S. 565, 51 L. Ed. 619, 27 S. Ct. 319 (1907). After noting that the discussion of the *Dartmouth College* case (*Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629 [1819]) in the state court could not be taken as an indication that a federal question had been raised, he said:

> "If a case is carried through the state courts upon arguments drawn from the state Constitution alone, the defeated party cannot try his chances here merely by suggested for the first time when he takes his writ of error that the decision is wrong under the Constitution of the United States. * * *" *Osborne* v. *Clark*, *supra*, 569.

D. *Appellant may not raise the federal question at the last moment in a petition for rehearing in order to save his right of appeal.*

Nor can the appellant suggest the federal question for the first time in his petition for rehearing.

> "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it." *Herndon* v. *Georgia*, *supra*, 443, and cases cited.

There was no hearing, argument or opinion rendered upon the appellant's petition for rehearing.

Obviously, the appellant desires to avoid the application of this well-settled rule to the present case. It might be successful if the facts here resembled those in *Cincinnati, Portsmouth, Big Sandy and Pomeroy Packet Co.* v. *Bay*, 200 U. S. 179, 50 L. Ed. 428, 26 S. Ct. 208 (1906) which it has cited in paragraph (5) of its Statement of the Basis of Jurisdiction. Then, perhaps, the certificate of the pre-

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siding justice might supply the evidence which would perfect jurisdiction. However in the *Cincinnati* case, there was no other evidence, no opinion, at any time, by the state court which would be of assistance to the United States Supreme Court in determining whether or not the federal question had been raised.

E. *No federal question is raised in the opinion of the Court.*

From an inspection of the opinion in this case it must be concluded that no federal question was raised or decided. If it had been, it would be in the opinion. So far as it appears from the record only the dissenting opinion, written by the presiding justice who has signed the certificate here in issue, ever raised or made specific reference to the Fifth and Fourteenth Amendments of the Federal Constitution. Upon this set of facts, it is submitted, that the certificate of the presiding justice, while entitled to respect, should not be permitted to preclude the United States Supreme Court from exercising its own authority in determining upon the face of the record whether or not the federal question was presented to or decided by, the Supreme Court of New Hampshire. See, *Charleston Assn.* v. *Alderson,* 324 U. S. 182, 186, footnote 1; rehearing denied 324 U. S. 888 (1945).

While the appellant appeals, technically, from the order of the State Court of September 3, 1946, which reads in its entirety, "Motion for rehearing denied," the substance of his appeal is necessarily based upon the opinion rendered on June 27, 1946. Not once, in the whole opinion is any part of the Constitution of the United States cited, and this is the only available expression of the "judicial mind" of the State Court, to which the United States Supreme Court has been asked to apply the Federal Constitution. Obviously the appeal must be dismissed for want of a properly presented Federal question.

II. The Opinion of the Supreme Court of New Hampshire Proceeds on Such Widely Accepted Doctrines of Constitutional Law as to Foreclose Further Argument.

The principles upon which the opinion is based, namely, presumption of constitutionality of a statute, judicial respect for legislative discretion upon matters of expediency, and the assumption that a state of facts existed which sustains the enactment of the remedial statute, find frequent expression in the opinions of the Supreme Court of the United States. These expressions are found, completely annotated in the late Chief Justice Stone's opinion in *Alabama State Federation, etc.*, v. *McAdory*, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384 (1945).

In the same opinion we find:

> "The Constitution does not oblige a state to regulate or reform all types of associations, or none. It may begin with such as in its judgment most need regulation. * * * *ibid* 472.

This supports the opinion of the Court that it is not necessary for the legislature to exercise its police power over the entire field in which an evil may exist.

Corrupt Practice Acts are patently a legitimate exercise of the police power. Both the number of such statutes (state and federal) now in effect, and also the numerous decisions of the courts sustaining their constitutional validity testify to this fact. Annotation, *Constitutionality of Corrupt Practice Acts*, 69 A.L.R. 377.

It would be a strange interpretation of the law to permit the legislatures to control the amount which a candidate may spend in a political campaign, so as to insure an equal right to be elected—a right which is guaranteed in New Hampshire by Article 11 of the Bill of Rights—and at the same time deny the states the authority to prevent pub-

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lishers from nullifying the legislation by charging different candidates different advertising rates. Statutes fixing disbursements have been sustained when attacked on constitutional grounds.

Adams v. *Lansdon,* 18 Idaho 483, 110 Pac. 280 (1910)
LaFollette v. *Kohler,* 200 Wis. 518, 228 N. W. 895 (1930)

Freedom of the press, and freedom of contract are not unlimited freedoms which may be abused at the expense of the community. Therefore they fall within the reasonable exercise of the police power.

Giragi v. *Moore,* 301 U. S. 670, 81 L. Ed. 1334, 57 S. Ct. 945 (1936);
Associated Press v. *N.L.R.B.,* 201 U. S. 103 (1937);
Associated Press et al. v. *U. S.,* 326 U. S. 1 (1945);
State v. *Chaplinsky,* 91 N. H. 310, 317, 18 Atl. 2d 754, aff'd. 315 U. S. 568, 86 L. Ed. 1031, 62 S. Ct. 766;
Commonwealth v. *Evans,* (Pa.) 40 Atl. 2d 137, 138-139 (1945).

Appellant emphasizes the case of *Grosjean* v. *American Press Co., Inc.,* 297 U. S. 233, 80 L. Ed. 660, 56 S. Ct. 444 (1936). The analogy is inept. Because of the expressed background found in the *Grosjean* opinion, it cannot be applied to the present circumstances where there is no hostility motivating the enactment of the statute, and where the purpose is not to limit the circulation of information or advertising of newspapers. In the *Grosjean* case the tax was held "bad because, in the light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax to limit the circulation of information to which the public is entitled in virtue of its constitutional guaranties." No tax is here involved.

As construed and applied by the Supreme Court of New Hampshire, Chapter 185 of the Session Laws of 1945 is neither arbitrary nor unreasonable. It is a valid, constitutional exercise of the police power of the state, which does not violate the Fourteenth Amendment to the Federal Constitution.

It is submitted that the United States Supreme Court should either dismiss this appeal for want of a properly presented federal question, or affirm for want of a substantial federal question.

Respectfully submitted,

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MOTION TO DISMISS OR AFFIRM

Now comes the Attorney General of the State of New Hampshire, appellee herein, and moves the Supreme Court of the United States to dismiss with costs the appeal taken herein, to wit, by the Chronicle & Gazette Publishing Co., Inc., appellant, upon the following grounds:

(1) There is no substantial Federal question involved or properly presented.

(2) It is clear that the decision of the Supreme Court of the State of New Hampshire sustaining the constitu-

tionality of the New Hampshire statute is in accordance with the previous decisions of the Supreme Court of the United States, so as to make further argument unnecessary.

In the alternative appellee moves this Court to affirm the judgment from which the appeal in the above entitled cause purports to be taken on the grounds heretofore mentioned in the appellee's motion to dismiss.

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